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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. CARLOS JOSEPH MCGEE, Petitioner.	2 CA-CR 2010-0326-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20053342, CR20093235, CR20093223

Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Joy Athena
Tucson
Attorneys for Petitioner

E S P I N O S A, Judge.

¶1 Petitioner Carlos McGee seeks review of the trial court's orders denying his petitions for post-conviction relief in three separate cause numbers, filed pursuant to Rule 32, Ariz. R. Crim. P. The proceedings have been consolidated for review. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). McGee has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, McGee was convicted of one count of solicitation to possess cocaine for sale in Cause No. CR20053342. The trial court imposed, inter alia, a $2000 fine and a $1600 surcharge and placed McGee on probation, which subsequently was revoked. In 2009, McGee was indicted again in two different cause numbers and pled guilty to failure to appear in Cause No. CR20093223 and to attempt to possess a narcotic drug for sale in Cause No. CR20093235. At a combined proceeding, the court held the probation revocation disposition hearing in CR20053342 and sentenced McGee for the underlying conviction in that case and for his convictions in the two later cause numbers. It imposed presumptive, consecutive, and concurrent terms totaling 5 years' imprisonment. The court also imposed, inter alia, a $2,000 fine and "a surcharge in the amount of $1,680.00" in each of the 2009 cause numbers.

¶3 McGee initiated proceedings pursuant to Rule 32 in all three causes,[1] arguing in his petitions for post-conviction relief that "[n]one of [his] offenses mandated

[1]McGee's notice of post-conviction relief in CR20053342 was filed in June 2010, six months after his sentencing in December 2009. The notice therefore was untimely. *See* Ariz. R. Crim. P. 32.4(a). But in his notice and petition McGee argued, pursuant to Rule 32.1(f), that his failure to file the of-right notice was without fault on his part. The

fines" and his fines should be reduced, that the trial court had "calculated incorrectly" the clean elections surcharge, and that "[t]rial counsel [had been] ineffective in failing to argue [his] indigency." The trial court summarily denied relief on all of McGee's claims, and McGee filed a petition for review in this court. On review, he challenges only the court's denial of relief on his clean-elections-surcharge claim.

¶4 Section 16-954(C), A.R.S. requires that "an additional surcharge of ten percent . . . be imposed on all civil and criminal fines and penalties collected pursuant to [A.R.S.] § 12-116.01" for deposit into Arizona's clean elections fund. Section 12-116.01 imposes surcharges totaling 61% on criminal fines. McGee reasons the additional ten percent surcharge under § 16-954(C) should be applied to the surcharges assessed by § 12-116.01 and not to the amount of his fines because § 16-954(C) applies only to surcharges "collected" pursuant to § 12-116.01. Thus, with the addition of the thirteen percent surcharge under A.R.S. § 12-116.02, McGee asserts his total surcharge in each cause should have been only $1,602, instead of $1,680 as the trial court calculated.[2]

¶5 Contrary to McGee's argument, we determined in *State v. Rogers*, No. 2 CA-CR 2009-0277, ¶ 9, 2010 WL 4705171 (Ariz. Ct. App. Nov. 19, 2010), that the statute's plain language required the court to impose "the § 16-954(C) assessment against

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trial court apparently accepted his argument that his attorney in CR20053342 had "not explain[ed] anything about Rule 32" to him, and the court addressed the merits of his claims.

[2]The trial court imposed only a $1,600 surcharge in CR20053342, and McGee does not allege specifically what different amount should have been assessed in that cause, based on his claim of error.

both the underlying fine and the surcharges imposed pursuant to § 12-116.01." Thus, for each of the $2,000 fines imposed in CR20093223 and CR20093235, the trial court should have assessed McGee a sixty-one percent surcharge of $1,220 under § 12-116.01 and a thirteen percent surcharge of $260 under § 12-116.02. And, pursuant to § 16-954(C), the court should have assessed an additional amount against McGee of $322—ten percent of the $1,220 surcharge pursuant to § 12-116.01 plus ten percent of the underlying $2,000 fine. Adding the $1,220 surcharge under § 12-116.01, the $260 surcharge under § 12-116.02, and the $322 surcharge under § 16-954(C), the total surcharge in each of McGee's 2009 causes should have been $1,802. *See Rogers*, 2010 WL 4705171, ¶ 9. Likewise, in CR20053342 the trial court should have assessed a fifty-seven percent surcharge of $1,140 under § 12-116.01, *see* 2002 Ariz. Sess. Laws, ch. 226, § 1, a $260 surcharge under § 12-116.02, and a $314 surcharge under § 16-954(C), for a total surcharge of $1,714.

¶6 Because the court imposed only $1,680 in surcharges in CR20093223 and in CR20093235, and $1,600 in surcharges in CR20053342, McGee was not prejudiced by the error.[3] Nor will we correct the error, which benefits McGee, because the state has not

[3]McGee also argues in his petition for review that the trial court "disagreed with [his] claim that the clean elections surcharge did not apply to the additional penalty assessments under A.R.S. § 12-116.02." But in dismissing McGee's petition, the court only stated that the surcharge applied to both the underlying fine and the surcharge required by § 12-116.01, it did not mention § 12-116.02. We note, however, that the court apparently calculated the $1,680 amount it assessed by calculating eighty-four percent of McGee's $2,000 fine. As reflected above, this means of calculation was incorrect.

sought review of the court's order. *See Rogers*, 2010 WL 4705171, ¶ 9. Thus, although we grant the petition for review, we deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge